(5)

FILED
FEB 22 1991
OFFICE OF THE CLERK

No. 89-2026

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., and
ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC.
Petitioners,

vs.

ROBERT ABRAMS, Attorney General of the State of New York,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WILLIAM H. CRABTREE
JANE LIGHTFOOT
Motor Vehicle Manufacturers
Association of the United States, Inc.
7430 Second Avenue, Suite 300
Detroit, MI 48202
(313) 872-4311

CHARLES H. LOCKWOOD, II
JOHN T. WHATLEY
Association of International
Automobile Manufacturers, Inc.
1001 Nineteenth Street North
Suite 1200
Arlington, VA 22209
(703) 525-7788

CHARLES A. NEWMAN*
LAWRENCE C. FRIEDMAN
THOMPSON & MITCHELL
One Mercantile Center
Suite 3400
St. Louis, MO 63101
(314) 231-7676

Counsel for Petitioners

*Counsel of Record

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Petitioners' Supplemental Brief in Response to Brief for United States as Amicus Curiae	1
Neither the Warranty Act Nor State Law Authorizes Parallel Private Dispute Mechanisms	3
The Government's Proposals Are Illusory and Unpersuasive	6

TABLE OF AUTHORITIES

Page

Cases:

Automobile Importers of America, Inc. v. Minnesota, 871 F.2d 717 (8th Cir.), *cert. denied*, 110 S.Ct. 201 (1989) 3 n.3

California v. ARC America Corp., 109 S.Ct. 1661 (1989) ... 4 n.3

Chrysler Corp. v. Texas Motor Vehicle Comm'n., 755 F.2d 1192 (5th Cir. 1985) 3, 4 n.3

Fidelity Savings & Loan Ass'n. v. De La Cuesta, 458 U.S. 141 (1982) 6, 7 n.7

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 7 n.7

R. J. Reynolds Tobacco Co. v. Durham County, North Carolina, 479 U.S. 130 (1978) 7 n.7

Securities Industries Ass'n. v. Connolly, 883 F.2d 1114 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 2558 (1990) 5 n.4

Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd., 474 U.S. 409 (1986) 7 n.7

Wolf v. Ford Motor Co., 829 F.2d 1277 (4th Cir. 1987) 4 n.3

Statutes and Regulations:

15 U.S.C. § 2301(6) 3

15 U.S.C. § 2310(a)(2) 3

15 U.S.C. § 2311(b)(1) 4

Cal. Civ. Code § 1793.2(e)(2) 8

N.Y. Gen. Bus. Law § 198-a(g) 5

N.Y. Gen. Bus. Law § 198-a(k) 4 n.3

N.Y. Gen. Bus. Law § 198-a(m)(1)(ii) 5

16 C.F.R. § 703 3

40 Fed. Reg. 60, 193 (1975) 4, 6, 7

Other Authorities:

H. R. Rep. No. 93-1606, 93d Cong., 2d Sess. (1974) 8 n.8

Givens, Practice Commentaries (N.Y. Gen. Bus. Law § 198-a), 19 McKinney's Consol. Laws Ann. 320 (1988) 6 n.6

No. 89-2026

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., and
ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC.
Petitioners,

vs.

ROBERT ABRAMS, Attorney General of the State of New York,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Pursuant to Rule 15.7, Petitioners submit their Supplemental Brief in Response to the Brief for the United States as Amicus Curiae. The United States agrees that the decision below is incorrect, Am.Br. 13 at n. 6, 17,[1] therefore, review should be granted.

The United States admits that the Petition correctly asserts that it is impossible for a warrantor's dispute resolution mechanism to comply

---

[1] The Brief for the United States as Amicus Curiae is referred to herein as the "Amicus Brief" or "Am.Br."

with both the New York Lemon Law and the Warranty Act. *Id.* at 15. The United States also agrees that ". . . application of the New York Lemon Law to federal remedies would 'upset the balance of [consumer and warrantor] interests so carefully addressed by [Rule 703]'." (citation omitted) *Id.* at 16. Finally, the Government concedes that the Lemon Law as so applied and so interpreted by the Court of Appeals is, contrary to the decision below, preempted.

The United States notes numerous errors in the decision of the Court of Appeals but lamely suggests that it is "premature" to grant the petition for review. Am.Br. 19. Characterizing the Second Circuit's failure to make "the distinction between ADR mechanisms established as a prerequisite under the Warranty Act and ADR mechanisms established for other purposes" as "narrow," the Government curiously suggests in lieu of review (and without concern for any procedural requirements) three bromides: (1) the Second Circuit might adopt the views of the United States in a future case; (2) the states may reexamine their lemon laws and, finally, (3) Respondent "may wish to reconsider . . . whether the New York Lemon Law should be interpreted to apply to ADR mechanisms offered solely as a prerequisite to suit under the Warranty Act." *Id.* at 19. Yet in attempting to trivialize the error below, the Government's rationale contradicts the statutory language of both the Warranty Act and the Lemon Law, the enforcement history of both statutes, and the legal analysis of preemption advanced by the Government.[2]

---

[2] The Amicus Brief, unaccepting of the construction of the Lemon Law adopted below by two courts and both Petitioners and Respondent, euphemistically refers to it as "expansive." Nevertheless, the United States notes that:

> Under this more expansive interpretation of the New York law, a warrantor is *not* permitted to establish a mechanism that meets only the minimum requirements of Rule 703 as a prerequisite to suit under the Warranty Act. Nor is a warrantor permitted to operate one mechanism for purposes of federal law and other for state law purposes. Instead, a warrantor wishing to require consumers to resort to an ADR process before suing under the Warranty Act must establish a mechanism that meets the requirements of state law.

Am.Br. 12 (emphasis in original).

Neither the Warranty Act Nor State Law Authorizes Parallel Private Dispute Mechanisms

The initial suggestion that the Warranty Act, 15 U.S.C. §§ 2301-2311 and its implementing regulations, 16 C.F.R. § 703 *et seq.* ("Rule 703"), can fairly be read as contemplating a parallel and duplicative system of state-regulated private ADR mechanisms is unsupported and impractical. The Warranty Act clearly authorizes the FTC to promulgate rules applicable to "any informal dispute settlement procedure which is incorporated into the terms of a written warranty" to which it applies. 15 U.S.C. § 2310(a)(2) (emphasis added). In light of the extremely broad definition of "written warranty," 15 U.S.C. § 2301(6), the Act and its implementing regulations clearly are meant to apply to any private ADR mechanisms that is incorporated into a warranty subject to the Act.

In an attempt to rationalize the erroneous holding below, the United States suggests that the Court of Appeals merely "failed to recognize" the Government's proffered distinction between Warranty Act mechanisms and parallel private ADR mechanisms subject to conflicting state regulation. Am.Br. 17. It then tenders a novel construction of the Lemon Law which has been rejected by both courts below and all parties. Both the District Court [Pet. A-38, 39], 697 F. Supp. at 738, and the Court of Appeals correctly noted that the Lemon Law is unquestionably intended to regulate Rule 703 mechanisms in the manner the United States concedes is violative of the supremacy clause. Pet. A-15; 889 F.2d at 1323 ("we do not believe that compliance with both the Lemon Law amendments and the FTC Regulations is impossible").[3]

---

[3]The United States' attempt to reconcile its strained interpretation with the other lemon law preemption cases is unconvincing. The Eighth Circuit, like the Court of Appeals here, expressly held that a state may regulate Warranty Act mechanisms—a result the United States now admits (Am.Br. 16) cannot be reconciled with the supremacy clause. *Automobile Importers of America, Inc. v. Minnesota*, 871 F.2d 717, 722-25 (8th Cir.), *cert. denied*, 110 S.Ct. 201 (1989). Similarly, *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192 (5th Cir. 1985) made a distinction between private ADR mechanisms and programs administered by a state. 755 F.2d at 1196-97.

(Footnote 3 continued on next page)

The United States' final rationale for its parallel state/federal theory is the Magnuson-Moss "savings clause," 15 U.S.C. § 2311(b)(1), which preserves existing state warranty rights and remedies. As noted in the Petition (Pet. 18-19) and Reply Brief (Br. 4-5), this provision preserves existing state substantive remedies and damages for breaches of warranty. The savings clause cannot be read as an authorization for states to enact private ADR procedures of their own. There were no state lemon laws in 1975 and thus Congress could not have intended to "preserve" remedies that were not contemplated by the legislators. *Cf. California v. ARC America Corp.*, 109 S.Ct. 1661, 1665 (1989) (extent to which Congress intended preemption considered with reference to state laws in existence at time the federal law was enacted).

The United States agrees with Petitioners that Congress delegated to the FTC authority to promulgate "minimum standards" for private ADR mechanisms in order to permit warrantors, rather than the states, to determine which additional procedures would be incorporated in their mechanisms. Am.Br. 10 n. 3. This is a fundamental feature of Magnuson-Moss, reflecting a "careful balancing of consumer and warrantor interests" (40 Fed. Reg. 60, 193 (1975)) and a Congressional and agency determination that individual warrantors be given options to structure their mechanisms in conformity with the demands of market competition rather than governmental fiat. If the savings clause is construed as a grant of authority to the states to regulate

---

(Footnote 3 continued)

Any private mechanism set up by warrantors is, the Fifth Circuit ruled, governed solely by Magnuson-Moss; state-run programs that are created as alternatives to these private mechanisms are not preempted. *Id.* at 1206. New York, like Texas, has an alternative state-administered dispute resolution forum. N.Y. Gen. Bus. Law § 198-a(k) (McKinney 1988). Such state procedures, however, are not at issue—Petitioners seek review of the other provisions of the lemon law that regulate private warrantors' programs.

The Amicus Brief's reading of *Wolf v. Ford Motor Co.*, 829 F.2d 1277, 1279 (4th Cir. 1987) is also strained, for the Court of Appeals expressly noted there that there is "no room for state regulation" of private ADR mechanisms. 829 F.2d at 1279.

private Warranty Act mechanisms, the options which the Amicus Brief acknowledges are essential to the express Congressional purpose of Magnuson-Moss will be repealed.[4]

Further, Respondent, specifically responsible for opining upon and enforcing the laws of New York, has acknowledged, as he must, that New York's Lemon Law clearly regulates Magnuson-Moss mechanisms.[5] New York did not contemplate that warrantors would create some chimerical state law mechanism that would exist alongside the federally mandated one. *E.g.*, Appellant's Reply Brief at 15, *Motor Vehicle Manufacturers Association v. Abrams*, 899 F.2d 1315 (2d Cir. 1990) ("manufacturers can comply with the Lemon Law and still include such programs in their warranty and require consumers to resort to their programs before suing in court under Magnuson-Moss"). Respondent's acknowledgements simply reflect the precise wording of the statute, which applies to any private new motor vehicle ADR mechanism, including a Warranty Act mechanism used within the state. N.Y. Gen. Bus. Law § 198-a(g) (McKinney 1988). The law's coverage of Warranty Act mechanisms is further confirmed by N.Y. Gen. Bus. Law 198-a(m)(1)(ii) (conspicuously ignored in the Amicus Brief) which expressly states that each mechanism in New York must

---

[4] This principle is illustrated by a recent case striking down, on preemption grounds, attempts to create parallel state procedures for private arbitration. Because Congress enacted federal legislation governing the enforceability of arbitration contracts, states may not undermine the federal policy by fostering parallel or concurrent state schemes of regulation. *E.g.*, *Securities Industry Association v. Connolly*, 883 F.2d 1114, 1120-21 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 2559 (1990). Similarly, concurrent state procedures at variance with Magnuson-Moss are impermissible.

[5] Consistent with the notion that the lemon law applies to Warranty Act mechanisms, Respondent specifically notes: "Without running afoul of Magnuson-Moss and Rule 703, the manufacturers can conform their arbitration programs to each of the specific requirements of the Lemon Law . . . ." Resp. Br. 9.

comply with Rule 703 and the state law — a requirement the United States concedes is repugnant to federal supremacy. Am.Br. 7.[6]

The Government's Proposals Are Illusory and Unpersuasive

In agreement with Petitioners, the United States notes that a state law which frustrates the specific objectives of federal law in impliedly preempted. AmBr. 8. However, in derogation of the clear federal mandate to encourage warrantors to establish cost-effective ADR mechanisms, the Government suggests that New York's Lemon Law does not frustrate the Warranty Act or Rule 703 if warrantors will simply accept one of three suggestions. First, and contrary to the explicit finding of the FTC that "[i]f costs are too high, warrantors may decline to incorporate Mechanisms," 40 Fed. Reg. 60,193 (1975), the Government blithely proposes that automobile manufacturers incur the duplicative burden and expense of offering two ADR mechanisms. Am.Br. 11. Second, the Amicus Brief counsels manufacturers to simply forego the Warranty Act's right to require prior resort to a federal mechanism as a precondition to suit under the Warranty Act. *Id.* Third, the Government derides the express Congressional *raison d'etre* of the Warranty Act—the encouragement of informal mechanisms—by suggesting that compliance with the New York Lemon Law be accomplished by not offering any Warranty Act mechanism at all in New York.

It is impossible to reconcile these notions with the principle of federalism and its corollary, implied preemption.[7] If the United States'

---

[6] The Practice Commentary to the statutory compilation of the lemon law also construes the statute as intended to regulate all Rule 703 mechanisms, and finds a conflict between New York and Magnuson-Moss. Givens, *Practice Commentaries* (N.Y. Gen. Bus. Law § 198-a), 19 McKinney's Consol. Laws N.Y. Ann. 320 (1988).

[7] This line of argument is directly contrary to this Court's holding in *Fidelity Savings & Loan Ass'n. v. De la Cuesta*, 458 U.S. 141 (1982) which prohibits states from mandating that which Congress has made optional:

(Footnote 7 continued on next page)

positions were found acceptable the supremacy clause would be "stood upon its head" and abrogated. In the specific context of the Warranty Act, these notions are incompatible with the recognized intent of Congress and the FTC to:

> . . . provide for fair and expeditious settlement of consumer warranty disputes, through informal mechanisms established voluntarily by warrantors. The Commission has determined that this legislative scheme is best implemented by a careful balancing of consumer and warrantor interests. The Rule [703] is intended to establish a framework for fair and expeditious settlement of warranty disputes at cost levels acceptable to warrantors.

40 Fed. Reg. 60, 193 (1975).

In short, the Amicus Brief's contrived theory of parallel state/federal regulation is a *deus ex machina* that fails to resolve the dilemma the United States concedes arises when states such as New York regulate private ADR mechanisms. The Government also disregards the clear Congressional delegation to the FTC to regulate any state

---

(Footnote 7 continued)

> *The conflict* [between federal and state law] *does not evaporate because the [federal] regulation simply permits, but does not compel*, federal savings and loans to include due-on-sale clauses in their contracts and to enforce those provisions. . . *The [federal agency] consciously has chosen not to mandate* use of due-on-sales clauses" because [it] desires to afford associations the flexibility to accommodate special situations and circumstances."

458 U.S. at 155. *See also R. J. Reynolds Tobacco Co. v. Durham County, North Carolina*, 479 U.S. 130 (1987) (in determining whether state property tax on tobacco was preempted by the Warehousing Act of 1846, central inquiry is whether imposition of state tax was incompatible with and would frustrate the purpose of the federal act); *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409 (1986) (state law which undermines Congressional determination that policy options "be determined by market forces" is preempted); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (state law which imposes higher standards for oil tankers is preempted).

involvement in Warranty Act mechanisms.[8] Indeed, the United States all but admits that its reading of the law leads to absurd results that neither Congress nor the FTC ever contemplated. Am.Br. 11 n. 4.

Because the United States agrees that the decision below was wrongly decided and that state attempts to regulate Rule 703 mechanisms are preempted, the Government tacitly concedes that review should be granted. Despite the attempt to minimize the error below, the Government can not diminish the impact of lemon laws that violate the federal regulatory scheme and upset the careful balance of interests determined by the FTC. Moreover, the suggestion that the preemption issue presented by the Petitioners is infrequent and thus unworthy of review (Am.Br. 7) is belied by the facts that: virtually all states have lemon laws, Am.Br. 4, Pet. 10 at n. 2; other states are adopting laws that explicitly regulate 703 mechanisms, *e.g.*, Cal. Civ. Code § 1793.2(e)(2); and states are continuing to amend their lemon laws. Pet. 12 at n. 3.

Contrary to the Amicus Brief's suggestion, states have already decided that they can regulate Rule 703 mechanisms. The Court of Appeals ruled that New York may do so, and the United States acknowledges that this conclusion was wrong. The decision is clearly at odds with the supremacy clause, and therefore, the writ should issue.

---

[8] The Congressional mandate of Section 10 requires that the Commission prescribe rules setting forth the minimum requirements for mechanisms, and that "Such rules shall provide for participation in such procedure by independent or *governmental entities*" (emphasis added). This language expresses the policy that there should only be one set of mechanisms and that the Commission should determine the extent of state participation (and, by necessary implication, state regulation). Indeed, the Conference Report accompanying S. 356 (Magnuson-Moss) strongly emphasized governmental participation in the FTC regulated mechanisms, used this language twice, and spoke specifically about state participation. H. R. Rep. No. 93-1606, 93d Cong. 2d Sess. at 26 (1974).

Respectfully submitted,

CHARLES A. NEWMAN*
Lawrence C. Friedman
THOMPSON & MITCHELL
One Mercantile Center, Suite 3400
St. Louis, Missouri 63101
(314) 231-7676

Counsel for Petitioners

*Counsel of Record

Of Counsel:

William H. Crabtree
Jane Lightfoot
Motor Vehicle Manufacturers Association
of the United States, Inc.
7430 Second Avenue, Suite 300
Detroit, Michigan 48202
(313) 872-4311

Charles H. Lockwood, II
John T. Whatley
Association of International Automobile
Manufacturers, Inc.
1725 Jefferson Davis Highway, Suite 1002
Arlington, Virginia 22202
(703) 525-7788